Filed 11/16/09 Kojababian v. Treyzon CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

VARTAN KOJABABIAN, Plaintiff and Appellant, v. BORIS TREYZON et al., Defendants and Respondents.	B212073 (Los Angeles County Super. Ct. No. BC392112)

APPEAL from an order of the Superior Court of Los Angeles County. Joseph R. Kalin, Judge. Affirmed.

Varoujan Nalbandian for Plaintiff and Appellant.

Treyzon & Associates, Boris Treyzon and Renata R. Salo for Defendants and Respondents.

* * * * * *

Plaintiff and appellant Vartan Kojababian appeals from an order sustaining a demurrer without leave to amend to a complaint filed against defendants and respondents Boris Treyzon and Treyzon & Associates (sometimes collectively Treyzon) which alleged a claim of conspiracy under the Uniform Fraudulent Transfer Act, Civil Code section 3439 et seq. We affirm. The trial court properly sustained the demurrer on multiple grounds, including that the complaint failed to state a cause of action, was barred by the statute of limitations and was barred by the agent's immunity rule.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

In June 2008, appellant filed a complaint for damages against Treyzon alleging a single cause of action for violation of Civil Code section 3439.[1] According to the complaint, Treyzon, an attorney, conspired with others to render uncollectible a judgment appellant obtained in October 2004 in a prior action entitled *Kojababian v. Momdjian*, Superior Court of Los Angeles County case No. BC236773 (prior action).

The conspiracy commenced in June 2003, when Treyzon, Mher Momdjian (the defendant in the prior action) and others allegedly conspired to apply for a loan on real property owned by Momdjian "in order to convert the remaining equity into cash and thereafter dissipate or hide the assets, and thus render any eventual collection activity by KOJABABIAN futile." In July 2003, appellant obtained a temporary protective order and sought a writ of attachment. In August 2003, Treyzon, acting as Momdjian's attorney, successfully applied for a one-week continuance of the hearing on that motion.

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[1] Unless otherwise indicated, all further statutory references are to the Civil Code.

During that week, first and second trust deeds were recorded on Momdjian's property and loan proceeds were disbursed to him. Thereafter, Treyzon assisted in selling the loans from the initial lender, Genuine Home Loans which was owned by Nectar Kalejian, to "KATZ, a coconspirator located by TREYZON."[2] For more than two years, Katz did not seek payment from Momdjian under the loan agreements.

On the basis of these actions, appellant alleged "that TREYZON conspired with [others] to proceed with the loan and the recording of the deeds with knowledge of Plaintiff's claim, and with the actual intent to assist MOMDJIAN in evading Plaintiff's attempts to collect on his claim." In more detail, appellant further alleged: "Under this conspiracy, the named defendants agreed that KALEJIAN would lend MOMDJIAN money, secured by MOMDJIAN's real property, in an amount representing most or all of the equity remaining in the property, and that subsequently, TREYZON would give KATZ the money to ostensibly purchase the loan from KALEJIAN—ostensibly as a bona fide purchaser for value without notice." Appellant sought general, special and punitive damages.

Treyzon demurred on multiple grounds, including that the complaint failed to state a cause of action, particularly one under section 3439; it was uncertain; and it was barred by the statute of limitations, laches, res judicata and the litigation privilege. In support of the demurrer, Treyzon sought judicial notice of the reporter's transcript of a November 28, 2006 hearing in a separate action brought by appellant against Momdjian, Superior Court of Los Angeles County case No. BC356558 (second prior action). At that hearing, the trial court denied appellant's petition to seek leave to add Treyzon as a defendant pursuant to section 1714.10, subdivision (a), a provision requiring a court order before alleging a cause of action that an attorney conspired with a client. In an unpublished decision, the Court of Appeal affirmed and remanded, noting that its decision in no way precluded appellant from seeking leave to add Treyzon as a defendant

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[2] The complaint does not specify Katz's first name.

pursuant to section 1714.10, subdivision (c). (See *Kojababian v. Momdjian*, case No. B195760.)

Appellant opposed the demurrer, emphasizing that the complaint was authorized under section 1714.10, subdivision (c), providing that a court order is not required to allege "a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain."

At the August 26, 2008 hearing on the demurrer, appellant further argued that he had not attempted to amend the complaint in the second prior action because summary judgment had been granted as to all remaining claims during the pendency of the appeal, and therefore there was nothing left to amend. After taking the matter under submission, the trial court issued an order in accordance with its tentative ruling to sustain the demurrer without leave to amend. The order set forth nine separate bases on which the demurrer was sustained: (1) The complaint failed to state facts sufficient to state a cause of action; (2) the applicable statute of limitations barred the complaint; (3) the complaint inappropriately sought leave to amend the second prior action; (4) the complaint was uncertain; (5) the complaint failed to state a claim in violation of section 3439 as there was no transfer or receipt of property by Treyzon; (6) the complaint failed to state a claim in violation of section 3439 as there was no debt owed by Treyzon to appellant; (7) the complaint was barred by the doctrine of res judicata; (8) the complaint was barred by the litigation privilege (§ 47, subd. (b)); and (9) the complaint was barred by the doctrine of laches.

Appellant appealed from the order sustaining the demurrer without leave to amend.[3] That order is not appealable. (*First Aid Services of San Diego, Inc. v.*

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[3] Appellant contends that the order is appealable pursuant to section 1714, subdivision (d), which makes appealable as a final judgment any order made pursuant to section 1714, subdivisions (a), (b) or (c). Because the order sustaining the demurrer was

California Employment Development Dept. (2005) 133 Cal.App.4th 1470, 1474, fn. 1.) The record on appeal does not show that the trial court entered a judgment of dismissal. Nonetheless, Treyzon has not moved to dismiss the appeal on this basis. Accordingly, in the interests of judicial economy and the orderly administration of justice, and in the absence of any demonstrable prejudice to the parties, this court in the exercise of its discretion deems this appeal to have been taken from a judgment of dismissal following entry of the order sustaining the demurrer without leave to amend. (*Ibid*.; accord, *Coast Plaza Doctors Hospital v. UHP Healthcare* (2002) 105 Cal.App.4th 693, 699; *Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal.App.4th 1, 3, fn. 1.)

DISCUSSION

Appellant challenges some but not all of the grounds cited by the trial court in its order sustaining the demurrer. As aptly explained in *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948: "We are not required to make an independent, unassisted study of the record in search of error or grounds to challenge a trial court's action. We are entitled to the assistance of counsel. When a brief fails to contain a legal argument with citation of authorities on the points made, we may 'treat any claimed error in the decision of the court sustaining the demurrer as waived or abandoned.' [Citations.]" (See also *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1413 ["unless a party's brief contains a legal argument with citation of authorities on the point made, the court may treat it as waived and pass on it without consideration"].) Thus, while we could find that the demurrer was properly sustained on the grounds unchallenged on appeal, we will consider appellant's limited challenges to the order.

I. Standard of Review.

On appeal, we review the trial court's sustaining of a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has

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not premised on any of these provisions, appellant cannot rely on section 1714, subdivision (d).

been stated as a matter of law. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We may affirm if any ground raised in the demurrer is well taken. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; *Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 13.) We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (*People ex rel. Lungren v. Superior Court, supra,* at p. 300.) "We do not, however, assume the truth of the legal contentions, deductions or conclusions; questions of law, such as the interpretation of a statute, are reviewed de novo." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373.) We may also disregard allegations which are contrary to law or to a fact of which judicial notice may be taken. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 559–560.)

We apply the abuse of discretion standard in reviewing the trial court's denial of leave to amend, determining whether there is a reasonable probability that the defect can be cured by amendment. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318; *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1701.) Appellant bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*Blank v. Kirwan, supra,* at p. 318; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020.)

II. The Complaint Failed to State a Cause of Action.

The complaint alleged that Treyzon conspired with Momdjian and others to deprive appellant of his ability to collect on his judgment against Momdjian by conspiring with Momdjian in connection with his loan application, persuading the court to delay the hearing on appellant's application for a writ of attachment and actively marketing the loan to another coconspirator. More specifically, appellant alleged that the defendants conspired to violate section 3439.04, which provides in part that a transfer is fraudulent as to a creditor "if the debtor made the transfer or incurred the obligation . . . . [¶] [w]ith actual intent to hinder, delay or defraud any creditor of the debtor."

(§ 3439.04, subd. (a).) In support of his claim, appellant alleged that Treyzon conspired with the other defendants to obtain the loan and record deeds of trust with knowledge of appellant's claim against Momdjian and with the intent to preclude appellant from collecting on the claim. Treyzon's alleged role in the conspiracy was to facilitate the purchase of the loan to an ostensible bona fide purchaser for value.

Appellant concedes that his conspiracy claim was subject to the provisions of section 1714.10, subdivision (a), which requires a plaintiff to obtain leave of court to allege a claim for civil conspiracy against an attorney with his or her client "arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client . . . ." (See *Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal.App.4th 599, 605 ["Section 1714.10 has been construed as requiring the pleader to allege compliance with the statute or risk falling to a demurrer"].) He contends, however, that his allegations satisfied the requirements of section 1714.10, subdivision (c), which provides the limited circumstances under which a prior court order is not required: "This section shall not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." The allegations of appellant's complaint satisfied neither requirement.

With respect to the existence of an independent duty, appellant argues that such a duty may be based on the general duty of ordinary care codified in section 1708. (See § 1708 ["Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights"].) But notwithstanding this general principle, courts have declined to find that an attorney owes an independent legal duty to an adverse party. "An attorney-client relationship normally is essential to the existence of an attorney's duty toward others." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 826 (*Berg*).) "This rings especially true where, as here, the attorney's client and the third party are adverse, as the attorney's

duty of loyalty to his or her client cannot be divided or diluted by a duty owed to a third party. [Citation.]" (*Ibid.*; accord, *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 961 ["[A]n attorney has no duty to protect the interests of an adverse party . . . for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services, and that the attorney's undivided loyalty belongs to the client"]; *Parnell v. Smart* (1977) 66 Cal.App.3d 833, 837–838 [where the defendant attorneys "occupy the position of counselor to the *adverse* . . . . it is unreasonable to conceive that defendants owed some sort of legal duty to plaintiff"].)

The complaint likewise lacked any allegations establishing that the conspiracy involved acts beyond client representation and was in furtherance of securing Treyzon's financial gain. (§ 1714.10, subd. (c).) As explained in *Berg, supra,* 131 Cal.App.4th at page 833, the first aspect of the exception "means that the attorney was acting not merely as an agent for his or her client, but also for his or her own benefit, and that the conduct therefore went 'beyond' the representative role." The *Berg* court continued, observing that "the second part of the exception in a sense defines the first in that it suggests that the attorney's exceptional conduct that is outside the performance of his or her duties to the client are those activities that are taken in furtherance of the attorney's own financial advantage." (*Id.* at p. 834.) It construed the financial advantage requirement "to mean a personal advantage or gain that is over and above ordinary professional fees earned as compensation for performance of the agency." (*Ibid.*; see also *Panoutsopoulos v. Chambliss* (2007) 157 Cal.App.4th 297, 306.)

Here, appellant alleged nothing to suggest that Treyzon was acting for his own benefit or the benefit of his firm, or that he expected to receive or received any financial gain over and above the fees he was earning for representing his client. Appellant suggests that we should infer the element of financial gain, arguing there could be no other reasonable explanation for Treyzon's alleged conduct. But the complaint's allegations indicate that Treyzon neither expected nor received any financial gain from the conspiracy, providing that although the majority of the funds used by Katz to purchase the loan were actually Treyzon's, Katz did not demand payments from

Momdjian under the loan for more than two years. Accordingly, the absence of any allegation that Treyzon's actions were in furtherance of his own financial gain was fatal to appellant's effort to allege a conspiracy under section 1714.10, subdivision (c). The trial court properly sustained the demurrer for the failure to state a claim.

III. The Statute of Limitations Barred the Complaint.

The trial court sustained the demurrer on the additional ground that the complaint was barred by the statute of limitations, citing section 3439.09. According to that provision: "A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought pursuant to subdivision (a) of Section 3439.07 or levy made as provided in subdivision (b) or (c) of Section 3439.07: [¶] (a) Under paragraph (1) of subdivision (a) Section 3439.04, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. [¶] (b) Under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred." (§ 3439.09.)

Here, though the complaint alleged that the challenged transfer occurred on August 7, 2003, appellant did not file his complaint until June 5, 2008. A demurrer is properly sustained where the complaint shows on its face that the action is barred by the applicable statute of limitations. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315–1316.) According to the complaint itself, appellant's fraudulent transfer cause of action was time-barred.

Indeed, appellant concedes that he did not file his complaint within the requisite four years. He argues, however, that the limitations period was tolled under section 1714.10, subdivision (a), which applies to a cause of action against an attorney for civil conspiracy and provides in pertinent part: "The filing of the petition, proposed pleading, and accompanying affidavits shall toll the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, shall permit the proposed pleading to be filed." We find no merit to appellant's argument. By its own terms, this provision has no application here for two

independent reasons. First, the ruling on appellant's proposed petition was unfavorable and appellant was not permitted to amend the complaint in the second prior action to add Treyzon as a defendant. Second, section 1714.10, subdivision (a) tolls the limitations period for the eventual filing of the "proposed pleading" while the court determines whether such an action is permissible; it does not toll the limitations period for the initiation of an entirely separate action. Because the limitations period in section 3439.09 was not tolled by section 1714.10, subdivision (a), the demurrer was properly sustained on the ground that the complaint was filed beyond the applicable four-year limitations period.[4]

IV. The Agent's Immunity Rule Applied to Bar the Complaint.

A further basis for the trial court's order sustaining the demurrer was the application of the agent's immunity rule, characterized as "litigation immunity" in the order. As summarized by the court in *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1605, the agent's immunity rule "is simply that 'duly acting agents and employees cannot be held liable for conspiring with their own principals . . . .' [Citation.] While the agent's immunity rule '"*derives from* the principle that ordinarily corporate agents and employees acting for or on behalf of the corporation cannot be held liable for inducing a breach of the corporation's contract"' [citation], the rule, on its face,

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[4] Neither in the trial court nor on appeal did appellant rely on the doctrine of equitable tolling. (See generally *Addison v. State of California* (1978) 21 Cal.3d 313, 317–319 [doctrine of equitable tolling provides that the limitations period for a cause of action is tolled while the plaintiff pursues a separate remedy for the same wrong in a court or administrative forum].) We therefore adhere to the well-established principle that "'[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

applies only to claims of conspiracy to commit a tort or violate a statute. [Citation.]" Indeed, the agent's immunity rule works in conjunction with section 1714.10 to the extent that "the only viable claims for an attorney's civil conspiracy with a client are claims that an attorney, conspiring to cause a client to violate a statutory duty peculiar to the client, acted not only in the performance of a professional duty to serve the client but also in furtherance of the attorney's financial gain [citation], or claims that the attorney violated the attorney's own duty to the plaintiff [citation]." (*Panoutsopoulos v. Chambliss, supra,* 157 Cal.App.4th at pp. 304–305.) Because appellant neither received a court order permitting him to allege a claim for civil conspiracy against Treyzon pursuant to section 1714.10, subdivision (a) nor alleged sufficient facts to invoke the exception outlined in subdivision (c), the agent's immunity rule applied to bar his claim.[5]

V. Leave to Amend was Properly Denied.

Finally, the trial court properly exercised its discretion in sustaining the demurrer without leave to amend. Appellant has not suggested either below or on appeal how he might amend his complaint to allege a viable cause of action against Treyzon and therefore has not met his burden to show the trial court abused its discretion in denying leave to amend. (See, e.g., *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 ["The plaintiff bears the burden of proving there is a reasonable possibility of amendment. . . . The plaintiff may make this showing for the first time on appeal. . . . [¶] To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'"].)

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[5] In view of the multiple grounds upon which the demurrer was properly sustained, we see no need to address the two remaining grounds raised in appellant's opening brief that have not been addressed by Treyzon. "We affirm the judgment if it is correct on any ground stated in the demurrer, regardless of the trial court's stated reasons. (*Aubrey v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)" (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.)

DISPOSITION

The order sustaining the demurrer without leave to amend, which we have construed as a judgment, is affirmed. Parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ